INDEX.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, appellant,
v.
JOSEPH J. DARLINGTON AND JOHN H. CLAPP, Trustees, Estate of John M. Clapp, deceased. } No. 219.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This appeal brings up for review a decree of the Court of Appeals of the District of Columbia reversing a decree of the Supreme Court of the District and remanding the cause to that court with directions to enter a decree restraining the Secretary of the Interior from executing an order of September 5, 1913, directing the reestablishment and appropriate marking of the boundaries of the public lands according to the Perrin retracement of the survey of the Muscupiabe grant, and permitting the settlers in the public territory involved to amend their

entries so as to include the area erroneously included as a part of the Muscupiabe grant in the Sickler survey (R. 24–32).

THE PLEADINGS.

Darlington and Clapp, trustees of the estate of John M. Clapp, deceased, owner of the grant, filed their bill of complaint against the Secretary of the Interior, alleging that the Muscupiabe grant was confirmed to one White in 1855, the survey thereof, made by one Hancock, being approved June 21, 1872, in accordance with which patent issued (R. 1–2, 13); that subsequently a bill was filed on behalf of the United States to set aside this patent but that the same was sustained in *United States* v. *Hancock*, 133 U. S. 193; that plaintiffs claim title under this patent, thus sustained by the decision of the Supreme Court of the United States (R. 2); that some question was raised in the late nineties as to the proper marking of the northern boundaries of the grant, and the Land Department entered into contract with one Perrin, a surveyor, to re-establish the same; that the grant is irregular in form, showing forty-nine stations in the boundary, and in the Perrin survey the original monuments were found and re-established except between stations twenty and twenty-five; that between these two stations the survey was protested by the owner of the grant, upon consideration of which the Secretary of the Interior, on October 30, 1902, refused to approve the Perrin survey and laid down the rule under which a proper

survey was to be made; that in accordance with these directions the survey commonly known as the Sickler survey was made, and approved by the Commissioner of the General Land Office May 19, 1906, and by the Secretary of the Interior February 28, 1907; that notwithstanding the foregoing facts the defendant Secretary of the Interior had assumed jurisdiction of the matter of the reestablishment of the boundaries of this grant as patented, and had rejected and held for naught the previously approved Sickler survey, and directed the Commissioner of the General Land Office to take appropriate steps to reestablish and appropriately mark the Perrin lines previously rejected (R. 2); that the result of this order, if carried into effect, will be the destruction of the markings of the approved Sickler survey, the casting of a cloud upon the plaintiff's title to the land between the two surveys, and the institution of numerous suits to the irreparable injury of the plaintiffs. That the plaintiffs are without adequate remedy at law (R. 2–4).

Copies of the departmental decisions of October 30, 1902, and September 5, 1913, are filed as exhibits with the bill, and the prayer is for an injunction to restrain the Secretary "from further proceeding under his said order of September 5, 1913, in attempted resurvey of your orator's grant" (R. 3, 4, 5–18).

The Secretary of the Interior filed a motion to dismiss the bill (R. 19) upon the following grounds:

1. The want of jurisdiction in equity because (*a*) title to the grant rested upon the patent under the

Hancock survey and not upon the Sickler survey; (*b*) that the Perrin and Sickler surveys were mere surveys to ascertain and locate on the ground the lines of the Hancock survey, in order to determine where the line of the public domain ends and that of the grant begins, and neither could change, nor did they attempt to correct, the Hancock survey; (*c*) that the duty of determining what are public lands subject to disposal under the public-land laws of the United States rests upon the Secretary; (*d*) that the authority for making, correcting, and retracing of public surveys is exclusively within the jurisdiction of the Secretary; (*e*) that the bill shows that the Secretary is merely endeavoring to ascertain where the lines of the grant lie on the ground and not to resurvey said grant nor to alter the lines of the lands as patented.

2. That this action of the Secretary was within his jurisdiction and discretion and can not be controlled by injunction.

3. That this is in effect a suit against the United States and is not authorized by law.

The Supreme Court of the District sustained the motion and dismissed the bill (R. 20).

The Court of Appeals reversed this judgment and ordered the entry of a final decree restraining the defendant as prayed (R. 24–32).

THE FACTS.

The Muscupiabe grant, according to the bill and exhibits, is a Mexican grant in California, confirmed in 1855. The grant was surveyed by Hancock in

1867. This survey was finally approved June 21, 1872, and on June 22, 1872, patent issued in accordance therewith. The validity of this location was sustained in *United States* v. *Hancock*, 133 U. S. 193 (R. 2, 13).

Since the Hancock survey there have been two attempts by the Land Department to relocate the north boundaries of the grant. These surveys are known as the Perrin and Sickler surveys. The Perrin survey was completed in 1896, and approved by the General Land Office October 30, 1901, "after having been suspended for many years and subjected to close scrutiny, and mature consideration" (R. 14). A protest was filed by the owner of the grant against the Perrin survey "between stations twenty and twenty-five." An examiner was appointed to make an examination of the survey and report his findings. After consideration of the report of this examiner the General Land Office declined to revoke its approval of the Perrin survey, but the then Secretary of the Interior, on October 30, 1902, reversed the decision of the General Land Office with instructions to relocate the stations between twenty and twenty-five (R. 5–13). Under these instructions the Sickler survey was then made, and was approved by the General Land Office May 19, 1906, and by the Department February 28, 1907 (R. 3). Upon protests filed in the General Land Office against this decision by Lafayette Mehham and C. L. Cate (R. 13), the First Assistant Secretary on September 5, 1913, saying that certain affidavits, together with the physical facts referred to

by Perrin in his field notes and by the examiners who inspected the works, "go far toward convincing the department that Perrin's survey was, substantially, a relocation of the Hancock survey" (R. 16), vacated the approval of the Sickler survey and adopted the line established by Perrin between stations twenty and twenty-five as the boundary of this grant, and directed the Commissioner of the General Land Office to take appropriate steps to re-establish and appropriately mark Perrin's line and the lines of the public lands affected thereby and permit the settlers to amend their entries to include the areas between the Perrin and Sickler surveys (R. 17, 18). A motion for rehearing of this departmental decision was filed by the grant claimants and was denied, the First Assistant Secretary saying (R. 18):

> The Hancock survey is the one which governs the limits of the grant, and the effort has been to properly reestablish the lines of that survey. The department is convinced that the Perrin lines more accurately delineate the original survey than does the later survey made by Sickler. The Perrin survey should not have been disturbed. The present purpose of the department is to correct the error which was made when that survey was set aside and the Sickler survey substituted therefor.

It is the execution of this departmental decision of September 5, 1913, which is directed by the Court of Appeals to be enjoined.

PROPOSITIONS.

To support the contention that the Court of Appeals erred in reversing the decree of the Supreme Court of the District, we present the following propositions covered by the assignment of errors (R. 33):

1. This suit is in effect one against the United States in whose behalf title is asserted to the land lying between the Sickler and Perrin surveys, and the courts are without jurisdiction because the United States has not consented to be sued or waived its immunity from suit.

2. The bill does not allege any grounds for the jurisdiction of equity; there is a want of jurisdiction to interfere with the executive administration, and an absence of indispensable parties.

3. In any event, the decree of the Court of Appeals is erroneous in directing an injunction to issue without an opportunity for the defendant Secretary to answer and set up the facts.

ARGUMENT.

I.

This suit is in effect against the United States and the courts are without jurisdiction because the United States has not consented to be sued or waived its immunity from suit.

The injunction prayed for in the bill of complaint and awarded by the Court of Appeals will affect no pecuniary interest of the Secretary but would bind the United States and determine its title to the 300 acres of land lying between the Perrin and Sickler

surveys, title to which is asserted on behalf of the United States by the Secretary. This suit is therefore in substance and effect against the United States. The United States has not consented to be sued or waived its immunity from suit, and there is a want of jurisdiction to grant the relief prayed. *Oregon* v. *Hitchcock*, 202 U. S. 60, 68; *Louisiana* v. *Garfield*, 211 U. S. 70, 77; *New Mexico* v. *Lane*, 243 U. S. 52. The considerations involved in this proposition are absolutely coincident with those required to be taken into view in order to determine the power of the Secretary. *Lane* v. *Mickadiet*, 241 U. S. 201, 210.

In *Oregon* v. *Hitchcock* the State of Oregon, asserting title under the Swamp Land Act, sought to restrain the officers of the Land Department from allotting and patenting swamp land on an Indian reservation. The bill was dismissed, and the Court, by Mr. Justice Brewer, said (p. 68):

> * * * While the nominal defendants are citizens of a State other than Oregon, yet they have no interest whatever in the controversy, and if a decree be rendered against them in favor of the State it will not affect their interests but bind and determine the rights of the United States, the real, substantial defendant.

In *Louisiana* v. *Garfield* a military reservation established in 1838 was abandoned in 1871. In 1895 the Secretary of the Interior approved a list of swamp lands presented by the State. In 1904 the Secretary ordered the approval of 1895 vacated

and the lands held for disposition by the Department on the ground that they were excepted from the grant because at that time embraced within a military reservation. An injunction was sought to prevent the Secretary from carrying out this order. Mr. Justice Holmes said (p. 75):

> We will assume for purposes of decision that if the United States clearly had no title to the land in controversy we should have jurisdiction to entertain this suit.

Upon the question of the existence of doubt as to the title of the State the Court said (p. 77):

> But that doubt can not be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard. The United States fairly might argue that the statute of limitations was confined to patents, or was excluded by the act of 1871. If it yielded those points it still reasonably might maintain that a title could not be acquired under the statute by a mere void approval on paper, if the United States ever since had been in possession claiming title, as it claimed it earlier by the act of 1871. It might argue that, for equitable relief on the ground of title in the plaintiff, in the teeth of the last-named act, it would be necessary at least to allege that the State took and has held possession under the void grant. The United States might and undoubtedly would deny the fact of such possession, and that fact can not be tried behind

its back. It follows that the United States is a necessary party and that we have no jurisdiction of this suit.

In *New Mexico* v. *Lane* the State of New Mexico asserted title to the 16th section under a school grant of June 21, 1898, and sought to enjoin the Secretary and the Commissioner from issuing patent to one Keepers who had made application under the coal land law. The school grant excepted mineral land, and the question was whether at the date of the grant the land was known coal land. The bill showed that the State had contested Keepers' application in the Land Department on the ground that the decision awarding the land to the applicant did not find the known coal character of the land at the date of the granting act, and the facts under the law as then construed and interpreted would not have rendered the land known coal land. There was a motion to dismiss on the ground that the United States was a real party in interest, for if the injunction should issue it "would be deprived of the purchase price of the land." The motion was sustained upon the authority of *Louisiana* v. *Garfield*, the Court saying that there were questions of law and fact upon which the United States was entitled to be heard. It was further held (p. 58) that "Keepers is an indispensable party, he having become, according to the bill, a purchaser of the land and paid the purchase price thereof."

II.

Equity has no jurisdiction to interfere with the executive administration. There is also an absence of indispensable parties.

Equity jurisdiction is attempted to be invoked by the bill on the ground that the execution of the departmental order would (1) destroy the markings of the Sickler survey, (2) cast a cloud upon the title to the land between the Perrin and Sickler surveys, (3) and would cause the institution of innumerable suits at law to the irreparable injury of the plaintiffs. We will examine these alleged grounds of equity jurisdiction in their order.

1. The Sickler survey.

The allegation of the bill is that the execution of the departmental order will destroy the markings of the Sickler survey. It does not follow that the adoption of the Perrin survey by the Secretary of the Interior and retracing the lines on the ground will destroy the markings of the Sickler survey, and the executive order of the Secretary does not direct the destruction of the markings of the latter survey. Aside from this, the plaintiffs' title does not vest either by reason of the Sickler survey or its approval by the Secretary. "A survey does not create title; it only defines boundaries" (*Russell* v. *Maxwell Land Grant Company*, 158 U. S. 253, 259); and the destruction of the markings of the Sickler survey will not affect the title of the plaintiffs to the grant as patented in accordance with the Hancock survey. There is

no attempt on the part of the Secretary to correct the Hancock survey, in accordance with which the plaintiffs' title vests, and the plaintiffs are not seeking to restrain the correction of that survey but of the Sickler survey, which is not a part of their muniment of title. An injunction is unnecessary to restrain the destruction of the markings of the Sickler survey unless it is shown that destruction of these markings is contemplated, but in no event will it lie when such monuments are not part of the muniment of the plaintiffs' title. Such injunction should not in any event restrain the remarking of the Hancock survey on the lines of the Perrin survey, but only the destruction of any markings of the Sickler survey.

2. Casting a cloud upon the plaintiffs' title.

It is again asserted that a survey does not create title, and the retracing of the Perrin line, already monumented on the ground, casts no cloud upon the plaintiffs' title, if any they have, to the land lying between the Sickler line and the Perrin line. The Hancock line governs the limits of the plaintiffs' grant, and whether or not the 300 acres of land lying between the Perrin line and the Sickler line fall on the north side of the Hancock line and are thus part of the public domain, or on the south side of that line and are therefore a part of the Muscupiabe grant, is a question of fact which may be inquired into in a proper case by the courts in whose jurisdiction the land lies. The language of Mr. Justice Brewer in

Russell v. *Maxwell Land Grant Company*, 158 U. S. 253, 259, is pertinent:

> * * * Whether a survey as originally made is correct or not is one thing, and that, as we have seen, is a matter committed exclusively to the Land Department, and over which the courts have no jurisdiction otherwise than by original proceedings in equity. While on the other hand, where the lines run by such survey lie on the ground, and whether any particular tract is on one side or the other of that line, are questions of fact which are always open to inquiry in the courts.

The Court of Appeals fell into manifest error in treating the approval of the Sickler survey as "finally determining outstanding vested rights" (R. 30). The vested rights of the owner of the Muscupiabe grant were finally determined by the patent and Hancock survey. Concededly, the Land Department has no authority after a patent has been issued in accordance with the Hancock survey to affect rights established thereby (*Cragin* v. *Powell*, 128 U. S. 691); but the Land Department necessarily has the right to determine what are public lands, and it is charged with the duty of asserting title thereto. In this case it is the duty of the Land Department to determine whether the lands lying between the Sickler survey and the Perrin survey are public lands, and jurisdiction to determine that fact is not lost until this land is actually patented. *Cragin* v. *Powell*, *supra*. The Secretary of the Interior who approved the Sickler survey had no authority to grant, and did not grant,

by approving that survey, the 300 acres of land lying to the north of the Perrin line, unless those 300 acres also lie to the south of the Hancock line. If they do not lie south of the Hancock line they are part of the public domain, and it is the duty of the Secretary to retrace the lines thereof and assert title thereto in behalf of the United States. His discretionary action in asserting that this land is within the public domain can not be controlled by injunction.

The case of *Kirwan* v. *Murphy*, 189 U. S. 35, is in point. This was a suit to enjoin Kirwan, surveyor general of the United States for the District of Minnesota, from making survey of certain land in controversy. The survey of the grant delineated the meander line of the lake as the boundary of the grant. The Land Department held that the land lying between the meander line and the lake, some 1,200 acres, was government land, and ordered it to be surveyed. The execution of this order was restrained, first by preliminary and later by perpetual injunction.

This court reversed this decree and ordered the bill dismissed.

After holding that if the complainants were owners of the 1,200 acres in controversy the proposed survey would be but a fugitive and temporary trespass, lacking the elements of irreparable mischief, and that a bill of peace will not lie where the legal remedy is adequate and persons directly interested are not made parties, are not numerous, and assert separate

and independent rights, the Court, in speaking through Mr. Chief Justice Fuller, said (p. 54):

> But, in the next place, was the Circuit Court justified in thus arresting the action of the Land Department in proceeding with a survey under the circumstances? In other words, can the Land Department be stayed in the discharge of a duty, not ministerial, but involving the exercise of judgment and discretion, on the ground that its jurisdiction has been lost by estoppel? We do not think so, and hold that complainants' contention that they are entitled to bound upon the lake involves a legal right, which cannot be properly passed on until after the department has acted.
>
> Having participated in the proceedings before the department, complainants, after survey was ordered, obtained this injunction against further administrative action, on the ground of absolute want of power, and not of error in its exercise.
>
> The administration of the public lands is vested in the Land Department, and its power in that regard cannot be divested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute. *Whiteside* v. *United States*, 93 U. S. 247; *Moffat* v. *United States*, 112 U. S. 24; *Hume* v. *United States*, 132 U. S. 406, 414. The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government, and the Land Department, charged with the duty of surveying the public domain, must pri-

> marily determine what are public lands subject to survey and disposal under the public land laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action. *Brown* v. *Hitchcock*, 173 U. S. 473.

In *Minnesota* v. *Lane*, 247 U. S. 243, a bill of complaint was filed by the State of Minnesota to quiet title to certain lands in that State and to enjoin the Secretary and the Commissioner from issuing a patent for the land to the Immigration Land Company, who had made application to purchase under the railroad adjustment land grant act of March 3, 1887, 24 Stat. 556, c, 376. It was contended by the State that the lands were within the limits of the Itasca State Park granted to the State by the act of August 3, 1892, 27 Stat. 347, c. 362. A hearing was held in the Land Department upon the issue between the State and the Immigration Land Company which was determined in favor of the latter and a rehearing denied.

The court said (p. 249):

> The purpose of the bill filed in this case is to quiet title to the lands in controversy by a decree in favor of the State of Minnesota notwithstanding the decision of the Secretary of the Interior, and to enjoin that officer from issuing patents for the lands to the Immigration Land Company.
>
> We are of opinion that the State has mistaken its remedy, and if it be true that the Secretary has made a mistake in overruling

> the contention of the State that the title passed to it under the Act of August 3, 1892, relief must be sought in the courts after the issuance of patent.

And further (p. 250):

> The Act of 1887, under which the Immigration Land Company claims title, specifically provides that patents shall be issued for lands to which the purchaser is entitled. The patents not having issued, the lands in controversy were still in course of administration in that department of the Government which, until patent issues, has exclusive control of proceedings to acquire the title.
>
> As we have said, the remedy must be sought in the courts after the issuance of patent. Under such circumstances as are here disclosed this court has uniformly so held. *Litchfield* v. *The Register*, 9 Wall. 575, 577; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592, 593; *Brown* v. *Hitchcock*, 173 U. S. 473; *Kirwan* v. *Murphy*, 189 U. S. 35; *Lane* v. *Mickadiet*, 241 U. S. 201, 208, 209.

See also *Ness* v. *Fisher*, 223 U. S. 683; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; and *Whitaker* v. *McBride*, 197 U. S. 510, 515.

8. Innumerable law suits and irreparable injury.

The allegation of the bill that the retracing of the Perrin survey will necessitate the institution of innumerable law suits and cause irreparable injury is answered by the holding of this Court that "the

proposed survey would be but a fugitive and temporary trespass, lacking the elements of irreparable mischief"; and if the action of the Secretary in this behalf would cause innumerable law suits, persons interested in bringing those suits are not made parties here, and assert separate and independent rights. *Kirwan* v. *Murphy*, *supra*, pp. 53, 54; *New Mexico* v. *Lane*, *supra*.

4. Jurisdiction of the Land Department and indispensable parties.

The case of *Minnesota* v. *Lane*, *supra*, and authorities therein cited, demonstrate that while the Land Department is undertaking to administer the land lying between the Sickler and Perrin survey as part of the public domain, there is no jurisdiction in the courts to afford relief to the parties complaining of the action of the Department. The remedy must be sought in the courts after patent issues. See also *Ness* v. *Fisher* and *Riverside Oil Company* v. *Hitchcock*, *supra*.

The Court of Appeals, to sustain its finding that after the approval of the Sickler survey the jurisdiction of the Secretary over this survey and the land in controversy ended, relies upon *Noble* v. *Union River Logging Co.*, 147 U. S. 165; *United States* v. *Schurz*, 102 U. S. 378; *Moore* v. *Robbins*, 96 U. S. 530; and *New Orleans* v. *Paine*, 147 U. S. 261. These cases are undisputed authority for the proposition that after patent to land has been issued and title thereto has passed from the Government, the Land Department has no jurisdiction over the land. Nor

is it disputed that after land has been patented according to a survey, title vests in accordance therewith (*Dominguez* v. *Banning*, 167 U. S. 723, 739); and the Secretary has no jurisdiction thereafter to correct the survey. These authorities might properly be relied upon if the Secretary were attempting to interfere with the Hancock survey and an injunction was sought in that behalf. They have no application where the Secretary is simply endeavoring to locate where the original survey runs on the ground, and is asserting title to all the public domain to the north of that line.

It appears that there are settlers upon the land in controversy, two of whom protested the approval of the Sickler survey (R. 13), and the order of the Secretary of the Interior complained of permits these settlers to apply for this land. They are asserting legal rights to enter these lands and the right to the possession thereof. They are the real parties whose interests are to be affected and their claims are adverse to the plaintiffs. The injunction directed to issue will prohibit the Land Department from entertaining their applications, and destroys their rights without a hearing. Of this situation the Supreme Court, in *Kirwan* v. *Murphy*, 189 U. S. 35, after citing *Litchfield* v. *The Register and Receiver*, 9 Wall. 575, where an injunction was sought to restrain the officials of the Land Department from entertaining and acting upon an application to preempt certain lands and the bill averred that the complainant was the legal owner of the lands; that they were not public

lands and were in no manner subject to sale or preemption by the Government or its officers, said (pp. 55, 56):

> It was held that the fact that complainant asserted himself to be the owner of the tract of land, which the officers were treating as public lands, did not take the case out of that rule, where it was the duty of these officers to determine, upon all the facts before them, whether the land was open to preemption or sale; and further, that if the court could entertain jurisdiction, the persons asserting the right of preemption would be necessary parties to the suit.
>
> Mr. Justice Miller further said: "After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the Land Department finally decides in his favor, he is not injured. If they give patents to the applicants for preemption, the courts can then in the appropriate proceeding determine who has the better title or right."
>
> And: "It appears on its face, that the register and receiver have no real interest in the matter, but that persons not named are asserting before them the legal right to preempt these lands. These persons are the real parties whose interests are to be affected, and whose claim of right is adverse to plaintiff. If the court should hear the case, and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of

> establishing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed, without the possibility of a hearing on the part of the party interested. This is not a case in which the land officers represent these claimants. They have no such duty to perform."

See *New Mexico* v. *Lane*, 243 U. S. 52, 58.

In *Minnesota* v. *Northern Securities Company*, 184 U. S. 199, 235, Mr. Justice Shiras, speaking for the Court, says:

> The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel. *Shields* v. *Barrow*, 17 How. 130; *Hipp* v. *Babin*, 19 How. 271, 278; *Parker* v. *Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black, 545.

In advance of final action by the Secretary in issuing patents to the homestead claimants for the land lying between the Sickler and Perrin surveys, which in the judgment of the Secretary is a part of the public domain, the courts will not interfere with the regular and orderly administration of the public land laws (*Humbird* v. *Avery*, 195 U. S. 480, 510), and the fact whether or not the 300 acres of land in controversy is part of the public land or of the

Muscupiabe grant can not be determined in this injunction suit.

We therefore confidently submit that there is a lack of jurisdiction to entertain the bill and a lack of jurisdiction to interfere with the action of the executive in determining what are public lands.

III.

The decree of the Court of Appeals is erroneous in awarding an injunction instead of remanding the case, recognizing the right of the defendant to answer and contest the bill on the facts.

Had the Supreme Court of the District of Columbia overruled the defendant's motion to dismiss it could not have entered a final decree. Defendant had five days thereafter in which to file an answer and contest the case on the facts. Equity Rules of the Supreme Court of the District of Columbia, No. 32.

When the Court of Appeals reversed the decision of the Supreme Court of the District and denied the motion to dismiss the bill of complaint it should have remanded the case for procedure under these rules. Certainly the defendant is not to be penalized because the court of first instance sustained his motion to dismiss the bill.

It may be that a discretion rests in appellate courts, upon overruling a motion to dismiss, to direct a decree or to remand for further proceedings, but the former alternative can only be adopted where under no state of facts could the defendants prevail in whole

or in part. It is *prima facie* inconsistent with the right of defendants to a full hearing and as well with the principle that the function of a demurrer, or motion to dismiss, is to demand the judgment of the court whether the defendant shall be compelled to answer the bill.

The new General Equity Rule No. 29, which is practically the same as said Equity Rule No. 32 of the Supreme Court of the District of Columbia, after abolishing demurrers and pleas and permitting defenses in point of law arising upon the face of the bill to be made by motion to dismiss or in the answer, provides:

> If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

The time-honored principle is thus laid down that a defendant should have opportunity to first test the legal sufficiency of the bill by motion to dismiss, and if unsuccessful, should still have opportunity to answer. In the recent case of *United States* v. *Mackey*, 216 Fed. 126, a ruling in point was made in the appellate court. Here the United States filed a bill to quiet title to certain Indian lands. Demurrers were filed, treated by the trial court as motions to dismiss under the new Equity Rules, and sustained, whereupon the United States appealed from the

decree dismissing the bill. In reversing this decision the Circuit Court of Appeals says (p. 127):

> We may properly say by way of premise that it would be unfortunate if the court should be compelled to decide the grave and important questions arising in this litigation, upon a mere motion to dismiss the bill and without the full presentation of the facts by way of lawful evidence.

And again (p. 128):

> The United States has never at any time had an opportunity to show by evidence that the allegations contained in paragraph 3 of the bill were true. On the contrary, they have been turned out of court by a finding that the Creek Nation had no right or interest in the land, and this not upon any showing of the United States, but upon a case gathered from the world at large.

The decision was as follows (p. 129):

> We think we can not do otherwise than reverse the decree of dismissal and remand the case with instructions to the trial court to deny the motions to dismiss *and allow the defendants to answer if they shall be so advised.* [Italics ours.]

The long-established practice of this court in like situations sustains our contention. *Davis* v. *Tileston*, 6 How. 113, was a bill in equity to enjoin a judgment. Defendants demurred to the bill, the demurrer was sustained, and the bill dismissed. An answer had also been filed a few days previous to the

judgment, but for some reason was not considered, and the only question before this Court was whether the judgment dismissing the bill on the demurrer was correct. The Court held that it was not correct, but said (p. 118):

> But as the answer in the present decision must be put out of the question, and as the demurrer admits all facts duly alleged in the bill, the plaintiff seems entitled to judgment on these admissions, though, to prevent injustice by oversight or mistake, we shall take care to render such an opinion that the respondents can be enabled in the court below to avoid suffering, if they possess a real and sufficient defense to the bill.

The decision was (p. 121):

> The judgment below in favor of the demurrer is therefore reversed. But in order that justice may be done between these parties on the answer and any evidence either of them may wish to file, final judgment is not rendered here for the plaintiff, but the case is remanded, in order that leave may be given to the respondents to withdraw their demurrer, and the cause to be heard on the bill and answer, if no evidence is desired to be put in; or on these and such evidence as the parties may wish to offer.

See also:

Erwin v. *Parham*, 12 How. 197, 206.
Clearwater v. *Meredith*, 21 How. 489, 493.
Virginia v. *West Virginia*, 206 U. S. 290.

CONCLUSION.

The judgment of the Court of Appeals of the District of Columbia should be reversed and the judgment of the Supreme Court of the District dismissing the bill of complaint should be affirmed.

Respectfully submitted.

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JANUARY, 1919.

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CASES AND DECISIONS CITED.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 219.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, APPELLANT,

vs.

JOSEPH J. DARLINGTON AND JOHN H. CLAPP, TRUSTEES, ESTATE OF JOHN M. CLAPP, DECEASED.

BRIEF FOR DEFENDANTS IN ERROR.

Statement.

This case comes before the court upon an appeal by Franklin K. Lane, Secretary of the Interior, from the decision of the Court of Appeals of the District of Columbia, granting the petition of the defendants in error for a writ restraining him from carrying into effect his certain order made with respect to a contemplated resurvey of a portion of the boundary of a certain Mexican private grant, known as the Muscupiabie Grant.

The grant in question was confirmed by the commission appointed to adjust Mexican land claims, and following the confirmation a survey of the outer boundary of the grant was made by one Hancock in 1867, which survey was finally approved by the Secretary of the Interior, and the patent of the United States was issued for the grant according to said survey, June 22, 1872.

At the time of the issuance of this patent the adjoining public lands were unsurveyed, but their survey was undertaken in 1885, and incidental to such survey it became necessary to retrace the boundaries of the patented private grant, and this was undertaken by one Perrin, deputy surveyor. About this time a bill was filed by the United States to set aside the patent issued for the private grant on the ground that the approval of the Hancock survey had been procured by fraud and misrepresentation, and because of this suit final action upon Perrin's retracement of the grant was suspended pending the result of said suit. The litigation involving the grant terminated with the decision of this court, which refused to sustain the allegations of fraud, but sustained the validity of the location of the grant and dismissed the bill (United States *vs.* Hancock, 133 U. S., 193). It was following this decision that Deputy Surveyor Perrin completed the retracement or resurvey of the grant under special instructions in 1896.

The grant in question is very irregular in shape, there being in the Hancock survey 49 calls or stations. Perrin's survey found the marks established by Hancock in place, or as established by him, the markings were acquiesced in by all interested parties, except between stations 20 and 25.

The present controversy deals with the portion of the grant between the stations last named. These stations occur along the northern boundary of the grant, and the real difficulty arises from the running of the line between stations 20 and 21.

Hancock's survey from stations 20 to 21 was at a distance of *30* chains to a sycamore tree. Perrin, in 1885, found a burnt sycamore tree at *30.15* chains. In completing his survey in 1896, he ran from station *20* on a random line *20* chains to a blazed sycamore tree, which he reported as known by old settlers as M-21. He prolonged the line to *30* chains and reported that he found no trace of a sycamore tree or evidence of there ever having been a tree at that point. He therefore determined that the sycamore at *20* chains was the proper corner, which he established as station 21 under the grant, and fixed the intermediate stations 22, 23 and 24 from this point following the courses and distances established by the Hancock survey, closing on station 25.

Protest against this survey reported by Perrin in 1896 was made by the owners under the grant, because by establishing station 21 at *20* chains instead of *30* chains, as called for by the Hancock survey, about 300 acres were excluded from the grant.

Because of the discrepancy in the two surveys made by Perrin in 1885 and in 1896 between stations 21 and 25, and certain other errors apparent on the face of his return, he was required to show cause why he was unable to place confidence in the retracement of his corners from 21 to 25 made in 1885, and why he should not return to the field and correct his survey.

On his response to the rule, the Commissioner of the General Land Office, by his letter of October 30, 1901, accepted the Perrin survey as a compromise line, from which appeal was taken to the Secretary of the Interior by the owners under the grant. Before this appeal was acted upon, the Commissioner of the General Land Office requested return of the papers, in order to have further examination made of this part of the grant, and it seems that two further examinations were made by one Hollyday and one W. S. Owen, special examiners.

It seems that these further examinations made were under instructions that required an ascertainment of the location under the terms of the original grant rather than an attempt to locate the survey of the grant made by Hancock. As a result of these investigations, the Perrin line as reported in 1896 *was found to comply substantially with the terms of the grant*, and for that reason the Commissioner of the General Land Office again determined to approve that survey, from which action the owners of the grant again appealed to the Secretary of the Interior, the matter being considered and disposed of in departmental decision of October 30, 1902, a complete copy of which is an exhibit to the bill filed in this case, and will be found beginning page 5 of the record.

An examination of this departmental decision will show that every phase of the case was fully and carefully considered and disposed of, as a result of which the Perrin Survey of 1896 was discarded, and directions clearly outlined for the survey of the grant between stations 20 and 25, and in that connection it was directed:

> "If any natural or artificial object indicating or marking Hancock's line of survey can be found they must necessarily control, and all parties in interest should be afforded an opportunity to establish such monuments if they can be found; but if they cannot be identified as Hancock's original corners or stations by some ascertained monument or object the line of survey must be established by the course and distance given in the patent but closing upon Station 25, irrespective of course and distance."

In accordance with instructions given a survey was made by Deputy Surveyor Sickler, which established and monumented the corners or stations numbered 21, 22, 23, and 24, thus connecting the stations as established by the Perrin Survey from 20 to 25. The plat of survey of the grant as thus established was duly approved by the Commissioner of

the General Land Office May 19, 1906, and by the Secretary of the Interior February 28, 1907.

It was under the boundaries of the grant thus established and monumented upon the ground that the surrounding public lands were connected and have since been disposed of, and thus the matter has rested as a closed transaction until upon the protests filed in May and June, 1913, challenging the correctness of the Sickler survey made of this grant and approved as before stated in 1907, that the plaintiff in error, acting through his First Assistant, by order dated September 5, 1913, attempted to resume jurisdiction of the question as to the proper location and markings of this grant, and to set aside the departmental order of 1907 approving the Sickler survey, with instructions to take appropriate steps to re-establish and appropriately mark the Perrin survey of 1896, and to permit the claimants to the adjoining lands to amend their entries so as to include the portion excluded from the grant by said last-mentioned survey.

This is the order against which the bill in this case was directed and against the carrying of the same into effect the court below granted injunction. A copy of the departmental order of September 5, 1913, was made Exhibit "B" to the bill filed in this case, and will be found beginning page 13 of the record.

It is our contention that the decision of the court below must be sustained upon the ground: *First*, that the departmental order of 1902 rejecting the Perrin survey between stations 20 and 25 was a proper determination and the only decision possible upon the record, and that the order of 1913 herein complained of was arbitrarily issued without justification; and *second*, that the investigation resulting in the final approval of the Sickler survey of the grant in 1907 was a finality, and that the later order of 1913 was *ultra vires*.

ARGUMENT.

I.

In 1885, when the survey of the surrounding public lands was undertaken, it was incident to such surveys that the patented private grant here in question be first appropriately and definitely located upon the ground, for the public lands must begin at the outer boundary marking the extreme limits to the grant.

This grant had not only been confirmed under the law and patented, but the boundaries of the grant as established by the Hancock survey had been sustained by the decision of this court in United States *vs.* Hancock, *supra*. It was therefore not within the power or authority of the officers of the Land Department to change or amend the boundaries of the grant as thus outlined and fixed by the Hancock survey. The Land Department could only relocate the line as fixed by that survey in order that the adjoining public-land surveys might be closed upon it, and as held by the Secretary of the Interior in his decision of October 30, 1902, the general rules that govern in the establishment of boundaries are applicable to and control in relocating and re-establishing that line.

Those rules and the order in which they are usually considered are: *First*, natural boundaries; *second*, artificial marks; *third*, adjacent boundaries; and *fourth*, course and distance. These rules, however, are not inflexible, as where the location of monuments and objects called for are involved in doubt and obscurity and cannot be ascertained with any reasonable degree of certainty, and where no mistake can reasonably be supposed in course and distance. The controlling principle in the location of boundaries being that what is most material and certain in a description must prevail over that which is less certain. Tyler on Boundaries (30); Newsom *vs.* Pryor's Lessees (7 Wheat., 7). But,

where natural or artificial objects are wanting, course and distance must govern in the absence of a more certain call. "If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given us and must be used. Chinoweth *vs.* Haskell's Lessees (3 Pet., 92)."

The record shows that while it was found impossible to exactly locate the Hancock survey of this grant according to its courses, distances and monuments, yet the several stations as identified and re-established by the Perrin surveys made in 1885 and 1896 were acceptable to all parties, excepting those occurring between stations 20 and 25.

Between 20 and 25 no one of the stations as monumented by Hancock could be actually located and identified. It may be that the suit attacking the validity of the grant led to the destruction of the monuments by encroaching settlers on the adjoining public lands. As before stated, the whole difference regarding the survey of this grant grew out of the attempted location of station No. 21.

When Perrin made his survey of the grant in 1885, he retraced the line from station 20 to station 21 by running north 54 degrees east 30.15 chains to a burned sycamore stump. This he accepted in that survey as station 21, and this substantially met the call of the Hancock survey. In resurveying this line in 1896 he ran from station 20, 54 degrees east on a random line *20* chains to a blazed sycamore tree, which he reported as known by old settlers as station 21 of the grant, and which he adopted. Prolonging the line to 30 chains, as called for by the Hancock survey, he reported there was no evidence of a sycamore tree at that point.

Owen, the special examiner, later reported that at about *30* chains from station 20 of the Perrin survey he found a burned sycamore stump, which the Secretary in his decision of October 30, 1902, *supra*, held was evidently the stump found and reported by Perrin in his survey of 1885.

In summing up the result of the several surveys, the Secretary of the Interior, in his decision of October 30, 1902, held:

> "It does not appear from the returns of the Perrin survey of 1896, or from any of the reports of the examination thereof, that 'M 21' of Hancock's survey has been identified sufficiently to warrant the termination of the line at 20 chains. The mere fact that Perrin found a blazed sycamore there having no distinguishing mark from other trees of the same kind, furnishes no proof that it is the original tree designated by Hancock as 'M 21' especially when found by such utter disregard of distance and to a certain extent out of course. The rule that monuments will not invariably control where they are involved in doubt and obscurity and where no mistake can reasonably be supposed in course and distance, applies with great force in this case where the supposed monument contains no evidence of the identity of the original monument and where it cannot reasonably be supposed that such excessive error in distance could have occurred."

It will be remembered that the portion of the grant between stations 20 and 25 was along the northern boundary of the grant, and according to the decree of confirmation, the grant was bounded on the north and east by "the foot of the mountain." Owen, in his report on the survey, which, as before stated, was made more with an idea of locating the line according to the decree of confirmation than a reproduction of the Hancock survey, said: "The question of determining the 'foot of the mountain' is an intensely difficult one, and is purely a matter of judgment, and construction of the definition of that phrase." In the absence, therefore, of the actual location of the monumented stations as fixed by the Hancock survey, there was surely no warrant to depart from the actual calls of the Hancock survey in fixing the limit of the grant in that locality. We say, therefore, not only was the decision of October 30, 1902, justified in re-

jecting the Perrin survey, but that no other determination was possible on the record than that made by said decision.

The subsequent survey made by Sickler was under direction to identify the monuments, if possible, and to hear all interested parties with respect thereto, but that failing to locate the actual monuments fixed by the Hancock survey, course and distance was the only guide remaining and must be followed, arbitrarily closing on station 25, accepted by all the interested parties.

It was in accordance with the directions thus given that the Sickler survey was made and monumented upon the ground, and the plats of that survey duly received the approval of the Commissioner of the General Land Office and of the Secretary of the Interior.

Let us now look to the order or decision of September 5, 1913, herein complained of, by which it is proposed to remove the Sickler survey as monumented and substitute in lieu thereof the Perrin survey, discarded in 1902. In said order or decision it is stated:

> "Perrin's survey having been approved and rights thereunder having attached, the Department was not justified, upon the ground that it was arbitrary, in setting it aside in favor of a survey wholly lacking in any evidence or correctness as a relocation of the Hancock survey except such as were afforded by courses and distances clearly shown to have been incompatible." (Page 16 of the record.)

The serious error herein is the misstatement that Perrin's survey had been approved and rights thereunder attached. As is shown clearly in the decision of October 30, 1902, while the Perrin survey was accepted by the Commissioner of the General Land Office, the grantee claimants appealed therefrom, and it was upon this appeal that the decision of October 30, 1902, was rendered.

It cannot be seriously questioned that the Secretary of the Interior was invested with jurisdiction to set aside the order

of the Commissioner of the General Land Office in accepting this survey. Any question in this regard is disposed of by the decision of this court in Knight *vs.* Land Association (142 U. S., 161). In that case it was held that:

> "The Secretary of the Interior had ample power to set aside the Stratton survey of the San Francisco Pueblo lands (although approved by the Surveyor General of California, and confirmed by the Commissioner of the General Land Office, with no appeal), and to order a new survey; and his action in that respect is unassailable in a collateral proceeding." (Syllabus.)

If the Secretary of the Interior possessed the power to set aside a survey of a grant approved by the Surveyor General and the Commissioner of the General Land Office *with no appeal*, surely his power is not lessened by the fact that the grantee claimants, within the time allowed therefor and in due accord with the rules, appealed from the action of the Commissioner of the General Land Office in accepting the Perrin survey.

Again, although the order of September 5, 1913, states that rights had attached under the Perrin survey, the rights referred to are not defined, and there is surely nothing in the order or in this record to show the existence of any rights adverse to those of the grantee claimant, and, as before stated, as the order accepting the Perrin survey was regularly considered by the Secretary of the Interior and held for naught, the survey being discarded and a new survey ordered, surely no rights could have attached under the Perrin survey.

In this connection it may not be inappropriate to call attention to the manner in which the Secretary's jurisdiction was attempted to be revived and the absolute disregard of the vested rights of the grantee claimants under the prior final departmental approval of the Sickler survey.

The decision or order of September 5, 1913, shows that it was predicated upon protests of certain-named parties, whose

claimed rights, if any, are not defined, although it may be accepted that they are persons who had entered or claimed under entries made of the public lands abutting upon the outer boundary of the grant as returned by the approved Sickler survey. It will also be noted that certain *ex parte* affidavits are referred to and accepted, all without notice to the grantee claimants or opportunity to be heard, and clearly without a hearing ordered, and on the false premise of the alleged approval of the Perrin survey an order was made that: "The approval of the Sickler survey is vacated and that survey is hereby rejected and held for naught; the line established by Perrin between stations 20 and 25 is adopted as the boundary of the grant, and you are directed to take appropriate steps to re-establish and appropriately mark Perrin's line and the lines of the public lands affected thereby."

In the court below granting injunction against carrying the order of September 5, 1913, into effect, the court, after a full review of the case, holds with respect to said order:

> "But the order before us is not to make further endeavor to establish the correct Hancock line, but to arbitrarily set aside the order confirming the Sickler survey and to substitute the Perrin line."

This is fully sustained by the record, and in our opinion is sufficient in itself to warrant the injunction against carrying that order into effect, conceding that jurisdiction was still retained in the Land Department for the purpose of reopening the settled controversy with regard to the boundaries and identification of this private land grant.

We have gone into the matter thus in detail, believing, as before stated, that no other conclusion than that reached in the final approval of the Sickler survey was possible on a fair consideration of the case upon its merits, and that the order of September 5, 1913, was without legal justification.

11.

Conceding the power in the Interior Department to retrace the patented grant in order to survey the adjoining public lands, the investigations respecting the retracement of the patented grant was a necessary incident, and in the absence of fraud was a finality, so far as the Land Department is concerned.

There has never been, nor is there in the present record, any suggestion of fraud in connection with the proceedings resulting in the final approval of the survey retracing and re-establishing the boundaries of this grant in connection with the survey of the surrounding public lands occurring, as before stated, in 1907.

The purpose of the bill filed in this case was neither with a view of investing the courts with jurisdiction to make or to correct a survey of the public lands. The land embraced within this patented grant was never a part of the public lands, and while the Land Department must determine where the private grant ended and where the public lands began, there must necessarily be a limit to the exercise of this jurisdiction.

If the final approval of the Sickler survey made after the full investigation that preceded it was not a finality, surely a further survey, as proposed by the order herein complained of, even if approved by the present Secretary or his successor, would not amount to a finality, and thus the matter of the final determination of the limit of this grant would forever remain an open question liable to contest and controversy in the Land Department for years to come.

When taking up the survey of the surrounding public lands in 1885, it was first necessary to locate the lines of the patented grant, for, as before stated, where the grant ended the public lands began. Undoubtedly the Secretary of the Interior possessed that jurisdiction that enabled him to in-

vestigate, re-establish, and fix upon the ground the limits of the patented grant incidental to the survey of the adjoining public lands. It is in this manner that the survey of the public lands must be undertaken.

Possessing this power to decide, the full exercise of the power ended with the final approval of the Sickler survey in 1907. As held in the decision of the court below:

> "But the crucial question here presented goes to the jurisdiction of defendant Secretary to reopen this case. The order for the remonumenting of the Hancock survey extended an invitation to all persons in interest to be heard, including those who had settled upon or initiated claims to surrounding lands. By this action the boundaries of the patented claim became fixed as the established mark or demarkation between it and the surrounding public domain. With the approval of the Sickler survey, made in accordance therewith, we think the jurisdiction of the Secretary ended." (Record, page 28.)

In the argument of this case below it was urged that this case is controlled by the decision of this court in the case of Kirwin *vs.* Murphy (189 U. S., 35). In that case a survey had been made and returned by which a supposed lake was meandered as containing within the exterior limits of the lake several thousand acres of land, when in reality the actual water line covered less than half that amount. Disposal had been made of certain uplands surveyed and returned by legal description as bordering on the purported meander line of the lake.

On discovery of the error in the return made by the public surveys, the Government, without in anywise interfering with the lines of or the acreage of the upland returned and disposed of, was proceeding to survey the omitted land adjoining said disposed-of tract, and the owner of the latter tract sought by injunction to restrain claiming lands beyond the lines of the tract which he had purchased, resting his claim solely upon the error in the Government survey. This

court held that the Land Department could not be restrained from investigating whether or not there was Government land between *the line defined in the patent* for the disposed-of tract and the lake. In this connection the court said, at page 54 of the opinion:

> "The power to do so is reposed in the political department of the Government, and the Land Department, charged with the duty of surveying the public domain must primarily determine what are public lands subject to survey and disposal under the public-land laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the courts *before it has taken final action*."

In the present case the Land Department, as heretofore repeatedly admitted, possessed the right to fix and determine the boundary between the patented grant and the adjoining public lands, but when this right had been exercised and the matter had been closed by the final approval of the plat reestablishing and monumenting the boundaries of the patented grant, the jurisdiction of the Land Office officials necessarily ceased. The distinction is clearly pointed out in the decision of this court in the case of Kirwin *vs.* Murphy, *supra*, for it is therein said:

> "Noble *vs.* Union River Logging Co., 147 U. S., 165, is not to the contrary, for that was a case where the executive department had confessedly finally acted and then attempted to resume jurisdiction, and an injunction was sustained."

The decision of this court in the case of New Orleans vs. Paine (147 U. S., 261), is very illuminating on this point. That case involved a survey of a grant, made April 3, 1879, by the proper authorities of the Province of Louisiana, to one Pierre de Lille Dupard.

Upon the acquisition of the territory of Louisiana by the United States under the Treaty of 1803, the greater part of this grant was confirmed to John McDonough & Company. In due course, the Government surveyed and fixed the front

and side lines of the grant, but it seems that neither of these lines touched Lake Mareupas, one of the calls in the grant, nor was it included between them.

In 1885, the State of Louisiana, claimant under the swamp land-grant adversely to the city of New Orleans which had succeeded to the title under McDonough, raised the question before the General Land Office as to what depth the grantee claimants were entitled. Thereupon, proceedings were had in the Land Department, the Surveyor General to whom the matter had been referred, deciding that the grant should extend to Lake Mareupas and the Amity River by extending its lower side line back to said water boundary.

On appeal, the Commissioner of the General Land Office affirmed the Surveyor General, but on further appeal, the then Secretary of the Interior, Mr. Lamar, decided January 6, 1888, that the depth of the grant should be determined in a different manner. Survey was thereafter made under the Secretary's direction, which never received the approval of the Secretary of the Interior, and his successor in office, Mr. Chandler, then acting as Secretary of the Interior, when the matter came before him for decision, May 14, 1891, disagreed with the survey as made under the previous Secretary's decision, and directed a new survey, and the action in question was brought against the surveyor to prevent a second survey, urging that the rights were fixed and determined under the decision of Secretary Lamar.

In disposing of this case, the court, after referring to its prior decision in Noble *vs.* Union River Logging Company, *supra*, said:

> "So, in this case, if it were made to appear that the former survey had been completed and approved in such manner that all the lands included within the lines of the former survey had become vested in the plaintiff, it is possible that it might be entitled to an injunction against any act which would have the effect of disturbing or unsettling a title thereby acquired. But the difficulty here is that the facts do not exhibit such a case. * * *

> "It is quite evident from this correspondence that the first survey was never formally approved by the Secretary of the Interior or the Commissioner of the Land Office, and that no title ever vested in the plaintiff to the lands included in this survey, though defendant, having obeyed his instructions, was, of course, entitled to his pay. If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. *Until the matter is closed by final action*, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing."

The clear distinction between the case at bar and the one considered by the court in the decision just quoted from, lies in the fact that in that case, while Secretary Lamar gave directions regarding a proper survey of the grant, when the matter again came before the department for final action, the then Secretary, without questioning the correctness of his predecessor's decision, differed with the Surveyor General in the construction thereof, and undoubtedly the jurisdiction was retained in the department until the final action of the Secretary in approval of the survey made.

In the case now before the court as fully shown, not only did the Secretary give directions as to the manner of defining the grant according to the Hancock survey, but the survey made under his direction received his final approval, and thereby the matter was closed by final action and the rights of the parties became thereby vested and fixed.

In the recent decision of this court in *Ex. rel.*, Knight *vs.* Lane, Secretary of the Interior (228 U. S., 6, 13), mandamus was denied because final action had not been taken by the Land Department, and in that case it was said:

> "As entirely opposite, we repeat the statement in New Orleans *vs.* Paine (147 U. S., 261, 266): 'Until the matter is closed by final action, the proceedings

> of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing.' "

Thus, the principle admitted, although not applied, in the case of New Orleans *vs.* Paine, *supra*, because the facts did not fit the case, namely, that injunction would lie as against the act of an officer who attempted to resume jurisdiction after the matter had been once closed by final action, is again recognized by the court.

Of necessity there must always be a limit to the exercise of a power, particularly so where it has relation to the title to real property, otherwise, there would never be any security in titles obtained to public lands. Ordinarily the jurisdiction of the Land Department, where a patent is required, terminates with the issuance of the patent. In this case the patent had issued under the private grant as long ago as 1872. The power of exercise grew out of the necessity for connecting the lines of the public survey with the grant as previously patented. As said in Williams *vs.* United States (133 U. S., 514-524):

> "It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice."

The jurisdiction possessed in the Interior Department after the issuance of the patent for this grant based upon the Hancock survey, was to locate the lines of that grant for the purpose of establishing boundaries of adjacent public lands as fixed in the Hancock survey, and if the station marks of that survey could not be found, its duty was to establish the

monuments by courses and distances as defined by the Hancock survey, and when that was accomplished by the final approval of the Sickler survey the jurisdiction of the Land Department necessarily ceased.

> "One officer of the Land Department is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court." United States *vs.* Stone, 2 Wall., 525, 535.

As said in the decision of the court below:

> "An order of the Secretary of the Interior, revoking the order of his predecessor re-establishing and monumenting the boundary of plaintiff's grant in accordance with the description in the patent, and arbitrarily substituting a survey considered and condemned by his predecessor, thereby reducing the area of plaintiff's patented grant, is an exercise of power equivalent to the revoking of a patent. It would amount to divesting plaintiffs of their property without due process of law, since a patent can only be annulled or cancelled by a court. Any attempt to thus interfere with rights so vested may be enjoined. In New Orleans *vs.* Paine, 147 U. S., 261, 264, the court, referring to Noble *vs.* Union River Logging Railroad, *supra*, in connection with the question it then had under consideration, said: 'In that case it appeared that the only remedy of the plaintiff was to enjoin the Secretary of the Interior from revoking his approval of a certain map, which operated as a grant of land. His contemplated action amounted in effect to the cancellation of a land patent. So, in this case, if it were made to appear that the former survey had been completed and approved in such manner that all the lands included within the lines of the former survey had become vested in the plaintiff, it is possible that it might be entitled to an injunction against any act which would have the effect of disturbing or unsettling a title thereby acquired.'
>
> "The grantee and his successors have been in undisturbed possession of the patented area for over forty years. Considering a similar situation, involv-

ing the power of the Secretary of the Interior, by an order made in 1861, to challenge a survey of the south line of the Fort Leavenworth Military Reservation made and approved in 1830, the court, in United States *vs.* Stone, *supra*, said: 'It was made in the year 1830, and since that time both parties have held possession and claimed up to the lines then established by the survey. In the case of private persons, a boundary surveyed by the parties and acquiesced in for more than thirty years could not be made the subject of dispute by reference to courses and distances called for in the patents under which the parties claimed, or on some newly discovered construction of their title deeds. We see no reason why the same principle should not apply in the present case.'

"This is the only principle upon which the security of title can rest. If power rests in the Secretary of the Interior to cancel the orders of his predecessors finally determining property rights simply because he differs from them in opinion, there would be no such thing as a vested title derived from the Government. If an order can be revoked forty years after issue of patent, and ten years after final re-establishment of the lines of the patented grant, it can be done after the lapse of a hundred years. Upon the finality of proceedings in the Land Department depends the security of titles emanating from the Government. The present order, if carried into effect, would impair the title of plaintiffs as vested by the terms of the patent. It is, therefore, beyond the jurisdiction of the Secretary, and a restraining order should issue."

It must be clear therefore that the jurisdiction of the Land Department with regard to the grant here in question terminated with the final approval of the survey in retracement of and re-establishment of the boundaries of this grant in connecting the lines of the public survey therewith. This being so, it follows as a necessary incident that the attempted resumption of jurisdiction after the lapse of six years and an attempt to destroy the markings of the grant and establish others at that late day was beyond the authority of the de-

partment, and the action of the officer was clearly *ultra vires*, and for that reason the decision of the court below restraining the plaintiff in error was fully warranted and must be sustained.

It was contended in the court below that no harm could come to the grantee claimants by the proposed action, but this can hardly be seriously contended. In the first place, the attack made by the order, issued under color of office, necessarily places a cloud upon the title of the grantee claimants. As before stated, if it is carried into effect it results in excluding from the grant as surveyed under the final approval given to the Sickler survey about 300 acres. At best, a suit would be necessary in order to remove the cloud thus placed upon the title.

Again, the destruction of the markings of the approved Sickler survey and the substitution of the survey now proposed to monument the old discarded Perrin survey must lead to expense and possible confusion under the conditions clearly outlined hereinbefore. Further, amendment of entries allowed for adjoining public lands under the Sickler survey will necessarily lead to additional confusion, necessitating suits in which such parties are made defendants with incidental difficulties arising therefrom.

Surely, a claimant is not forced to await the visiting of the difficulties proposed and the assumption of a burden to remove the same where, as before stated, the act of the official is clearly unauthorized and without his jurisdiction.

As said by the Court of Appeals of the District in the case of Santa Fe Pacific Railway Company *vs.* Lane (43 App. D. C., 497), afterwards considered by this court (244 U. S., 492):

> "If a court of equity is powerless to stay the hands of an official of the Government from perpetrating through the proposed scheme this threatened injury, the guarantee of justice through the agency of the courts becomes a farce, and the citizen is left without protection from the arbitrary and capricious exactions of executive power."

Appellant's Brief.

In the appellant's brief it is first contended that this is a suit against the United States, solely from the fact that there are three hundred acres of land lying between the Perrin survey, which it is now proposed to substitute for the approved Sickler survey.

It will be remembered that the Perrin survey failed of approval by the head of the Land Department, and that the Sickler survey was the result of his order made when discarding the Perrin survey. The Sickler survey received the approval of the head of the Land Department, and is consequently the only authorized survey. All disputed matters of either law or fact suggested by this appeal received full consideration by the Land Department when the matter of the correctness of the Perrin and Sickler surveys was under consideration, and the decision of the Land Department, ending with the approval of the Sickler survey, was a finality. Hence, the interests of the United States in the premises having been fully determined by the head of the Land Dpartment, the office of the Government charged with the full responsibility in this behalf, eliminates any possible question of a remaining interest in the United States in the premises.

The action complained of in this proceeding is the attempted resumption of jurisdiction by the present head of the Land Department, and while the order complained of is clearly *ultra vires,* it being an act done under color of the office as head of the Land Department, necessarily casts a cloud upon appellees' title, and unless restrained must result in irreparable damage.

Let us consider the decisions relied upon in appellant's brief.

Oregon vs. Hitchcock (202 U. S., 68),

involved claim under the swamp-land grant. The determination of what are swamp lands within the meaning of

that grant rests upon the head of the Land Department, and further the act provides for the issuance of a patent, and until the patent is issued, the Land Department retains jurisdiction to administer the act. In other words, there is no finality until the patent issues.

Louisiana vs. Garfield (211 U. S., 70).

This case also involved claim under the swamp-land grant. There were questions of law and fact respecting the title claimed under the grant, and these could not be determined without the right of the United States to be heard thereon.

New Mexico vs. Lane (243 U. S., 52),

involved claim under the enabling act, which made a grant of certain lands non-mineral in character. Questions concerning the construction of the laws, and questions concerning character of the land and knowledge of it, were all involved; hence, they could not be determined without the right of the United States to be heard.

Minnesota vs. Lane (247 U. S., 243),

involved claim under the grant made to the State of all undisposed-of lands in certain described subdivisions in said State. In a controversy before the Land Department between the State and claimants, the latter claiming under the act of March 3, 1887 (24 Stats., 556), the Department held in favor of the claimants under the act of 1887, but that act required a patent, and none had issued. Clearly the matter was still within the jurisdiction of the Secretary of the Interior, to be terminated only with the issuance of the patent.

Lane vs. Mickadiet (241 U. S., 201),

was an attempt by mandamus to control the Secretary of the Interior respecting an Indian allotment. The Secretary has exclusive jurisdiction to determine heirs of an Indian allottee

in case of death within the restricted period, and this court held that the writ of mandamus would not be issued to control the conduct of the Secretary concerning a matter within his administrative authority.

These cases have no possible application here, for in the case at bar every question, both of law and fact, was passed upon by the head of the Land Department, and, as repeatedly stated, final action taken in approval of the survey delimiting the patented grant in connection with the survey of the adjoining public lands, which survey was made under the specific directions of the Land Department.

Appellant does not question this, but claims the right to disregard the prior adjudication, merely because he disagrees with the conclusion reached. In other words, he claims the right to cancel and annul the final act of his predecessor in this matter, and to reopen and substitute his order in its stead. The mere fact that, through such illegal act, more land would be excluded from a private grant, does not make the United States a party interested in any such illegal proceeding.

Appellant also contends, in effect, that even though his act is unwarranted, it is harmless and is beyond the right of the courts until the threatened injury complained of is actually visited upon the appellees. As hereinbefore shown, the northern and eastern boundary of this grant, according to the decree of confirmation, is "the foot of the mountain." This is very indefinite, and the delineations through monuments placed in actual survey become a necessary incident and a part of appellees' muniment of title.

The Hancock survey undoubtedly fixed the boundary of the grant, but when attempting to connect the lines of the survey of the public lands adjoining the grant, the monuments between stations 21 and 25 could not be identified, and,

under departmental direction, the same were established, or, in other words, the grant was renonumented between stations 21 and 25, in accordance with directions given by the head of the Land Department. Under these circumstances, there can be no question but that, with the approval of the Sickler survey, the monuments established thereby became a part of appellees' muniment of title binding on the grantee claimant, and on those claiming surrounding lands through the United States. To reject the approved Sickler survey, with orders to substitute another in its stead, necessarily calls for the destruction of the markings of the rejected survey; otherwise, confusion must result in a duplicate set of monuments. The order herein complained of is "the approval of the Sickler "survey is vacated and that survey is hereby rejected and "held for naught; the line established by *Perrin between sta-"tions 20 and 25 is adopted as the boundary of the grant, "and you are directed to take appropriate steps to re-estab-"lish and appropriately mark Perrin's line and the lines of "the public lands affected thereby. The Department concurs "in your recommendation that the settlers in the territory in-"volved be permitted to amend their entries to include the "area taken from them by the erroneous approval of the "Sickler survey.*"

In this connection we append to this brief a copy of the letter from the Commissioner of the General Land Office on which the order complained of was based. This shows, beyond question, the real effect of the proposed action.

In appellant's brief it is said, page —, "Plaintiff's title "does not vest either by reason of the Sickler survey or its ap-"proval by the Secretary. 'A survey does not create title; it "only defines boundaries: Russell *vs.* Maxwell Land Grant "Co., 158 U. S., 253-259;' and the destruction of the mark-"ings of the Sickler survey will not affect the title of the "plaintiffs to the grant as patented in accordance with the "Hancock survey."

In our opinion, the Russell case herein referred to fully supports the views herein contended for. In that case the grant involved was confirmed by act of June 21, 1860, but was not surveyed until 1878, and patent issued according to such survey in 1879. The land involved in the Russell Case was within the limits of the grant as so surveyed and patented. Prior thereto, to wit, in 1871, public-land surveys had returned the land involved in the Russell Case as a part of section 20, Tp. 33 S., R. 68 E., April 6, 1874, an ancestor of Russell applied to homestead said described land, and September 5, 1976, proved up and received final certificate therefor. May 19, 1888, the grantee claimant commenced an action to recover possession of the land, and the verdict and judgment were in favor of the grantee claimant. In disposing of the case, this court said, at page 255:

> "The only claim of the defendants is one under the United States, arising on April 6, 1874, fourteen years after the confirmation of the Maxwell Land Grant. It is therefore inferior and subordinate to that of the plaintiff.
>
> "In order to obviate the effect of this, the defendant offered to prove on the trial that the survey described in and upon which the patent was based was inaccurate, and that a correct survey would run the lines of the Maxwell Land Grant so as to exclude therefrom the tract in controversy. This testimony was rejected by the court, and this is the error complained of."

Again, at page 258, it was said:

> "And in the nature of things a survey made by the Government must be held conclusive against any collateral attack in controversies between individuals. There must be some tribunal to which final jurisdiction is given in respect to the matter of surveys, and no other tribunal is so competent to deal with the matter as the Land Department. None other is named in the statutes. If in every controversy be-

tween neighbors the accuracy of a survey made by the Government were open to question, interminable confusion would ensue. Take the particular case at bar; if the survey is not conclusive in favor of the plaintiff, it is not conclusive against it. So we might have the land-grant company bringing suit against parties all along its borders, claiming that, the survey being inaccurate, it was entitled to a portion of their lands, and, as in every case the question of fact would rest upon the testimony therein presented, we should doubtless have a series of contradictory verdicts; and out of those verdicts, and the judgments based thereon, a multitude of claims against the United States for return of money erroneously paid for land not obtained, or for a readjustment of boundaries so as to secure to the patentees in some other way the amount of land they had purchased.

"It may be said that the defendants have the same right to rely upon the regular surveys, that the plaintiff has upon the survey of this special land grant. This is undoubtedly true, but the survey is one thing, and the title another. If sectional lines had been run through the entire limits of the Maxwell grant, it would not thereby have defeated the grant or avoided the effect of the confirmatory act. *A survey does not create title; it only defines boundaries.* Conceding the accuracy of a survey is not an admission of title. So the boundaries of the tract claimed by defendants may not be open to dispute, but their title depends on the question whether the United States owned the land when their ancestor filed his homestead claim thereon. If at that time the Government had no title, it could convey none.

"In this connection it may be well to notice a distinction which interprets some dicta and decisions found in respect to the jurisdiction of courts over boundaries. Whether a survey as originally made is correct or not is one thing, and that, as we have seen is a matter committed exclusively to the Land Department, and over which the courts have no jurisdiction otherwise than by original proceedings in equity. While on the other hand, where the lines run by such survey lie on the ground, and whether any particular

> tract is on one side or the other of that line, are questions of fact which are always open to inquiry in the courts. In the case before us the offer was not to show that the land in controversy was one side or other of the line established by the survey. On the contrary, it was conceded that it was within the limits of the survey, and the offer was simply to show that that survey was inaccurate, and that the lines should have been run elsewhere, but this is not a matter for inquiry in this collateral way in the courts."

It will be seen that the expression taken from this opinion, and quoted in appellant's brief, referred to the survey of the land, and its return in the usual manner, as applied to public lands in 1871, prior to the survey of the confirmed private grant. It had no reference to the boundaries of the grant as fixed by the survey of the Land Department, for it was admitted in that case that the land involved was within the limits of the private grant, as surveyed and patented. As before said, however, in our opinion, the part quoted from said decision fully supports the view herein contended for, and further shows the consequences should such final action regarding the survey of a private grant be held as binding on no one.

This brings us to the final suggestion of appellant's brief, namely, the court below erred in awarding the injunction without opportunity to the defendant to answer.

Replying, we call attention to the fact that the bill filed in this case took its statement of facts from decisions of the Land Departments made exhibits to the bill, and, therefore, there is and could be no question of fact in dispute.

Again, appellant must know that nothing is denied them by failure to be afforded an opportunity for answer, and we call particular attention to the fact that the brief suggests nothing available in support of this feature of the case.

Finally, if this objection is seriously contended, why was effort not made in the court below, by motion for rehearing or otherwise, to secure the opportunity of answering further? Without intention to reflect on counsel, we feel safe in saying the objection to the decision below in this regard is more technical than substantial, and that no good reason is assigned, nor does any exist, for longer prolonging this controversy through a return to the Supreme Court of the District of Columbia, with privilege to answer.

We ask that the decision of the court below be affirmed and the title of the appellees in the premises be put beyond dispute and they thereby saved further expense and annoyance with reference to a title heretofore fully reviewed and approved of, both in the Land Department and this court.

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys for Appellee.

APPENDIX.

In reply please refer to 313653 "A" J. McP.

Department of the Interior.

General Land Office.

Washington, D. C.

May 16, 1915. A. W. B.

Address only the Commissioner of the General Land Office.

[Stamped:] Dept. of the Interior. Sec'y's Offi., Mails & Files. Received May 17, 1913. To Asst. Atty. Genl.

The Secretary of the Interior.

SIR: It was decided, after an informal conference with your Department, that this office should prepare a report and submit recommendations in the matter of the complaint of Lafayette Mecham, in which he alleges that certain lands belonging to him have been wrongfully included by a resurvey within the limits of the Muscupiabe grant.

Michael Waite in 1843 petitioned the Mexican Government for a tract of land known as Muscupiabe and described as bounded on the north by the foot of the moutain, on the south by Agua Caliente, and on the west by the Alisos, etc. For a history of the case, see United States *vs.* Hancock (133 U. S., 193). The tract as confirmed was surveyed by Deputy Henry Hancock and the plat of such survey was approved June 21, 1872. The tract was patented June 22, 1872.

The Government having failed to set aside the patent in an action brought for that purpose (see decision above

cited), and it being represented that the north boundary was not well defined, Contract No. 389 was entered into with George H. Perrin, a contract deputy, to reestablish the boundary. The tract included within the boundaries of the Muscupiabe grant is irregular in form, the approved plat of survey thereof showing 49 stations in the boundary lines. That part of the boundary between station 20 and station 25 is involved in this inquiry. The lands in dispute are situated in T. 2 N., R. 5 W., T. 2 N., R. 4 W., T. 1 N., R. 5 W., and T. 1 N., R. 4 W. S. B. M. The total area involved is less than 300 acres.

Perrin's survey, after having been suspended for many years, was finally approved by office letter "E" of October 30, 1901. A protest having been filed by J. M. Clapp, of President, Pennsylvania, an alleged owner of the Muscupiabe grant, this office, by letter of March 27, 1902, directed Mr. W. O. Owens, an examiner of surveys, to make a careful examination of such survey and to report his findings. One of the principal reasons for questioning the accuracy of the Perrin survey was that Call 20 of the grant, or the line from station 20 to station 21, was given, in the field notes of Hancock and the patent as issued, as N. 54, E., 30 chains, whereas Perrin ran said line a distance of only 20 chains, as he found at such distance evidence of what he believed to be Hancock's station 21.

In the letter of this office of July 10, 1902, to Examiner Owens, it was said:

> " * * * You report not having found any definite proof or indication that the line 20-21 should be extended to 30 chains instead of 20, there being no evidence of a marked tree or very large stump at that distance and no sign that one was removed, and you find that to run thence on the next course S. 51° E., would carry the line 'through dense brush, over broken and rocky country sloping to the south,' which you regard as still further upon the mountain, hence not agreeable to the terms of the grant. From these and other incidental features found by actual

> examination of the country, your judgment is expressed that you have found no way to carry out the instructions as to making a new line of a more just and equitable nature than the line already run and accepted. The returns of all of the surveyors engaged on this great boundary seem to agree in showing that the Hancock survey cannot be reproduced on the ground from one point to another without alteration in some of the courses and distances, because it was probably erroneous or very carelessly run in 1856. It is, then, hardly consistent to ask that one course (as from 20 to 21) must, as a matter of right, be run exactly as Hancock reported, when that involves the shortening of another course that has the same presumptive value. * * * You were instructed to exercise your judgment in the matter and your conclusion is that you can find no way to adjust the line to the requirements better than it is at present located, owing to physical features which, in your estimation, are prohibitive of any change looking to an accurate and equitable observance of the original conveyance. Your report is approved and the requirement that you execute and establish a new survey is hereby rescinded. * * * "

By office letter "E" of July 12, 1902, addressed to Mr. John M. Clapp, of President, Pennsylvania, this office, after setting forth the facts and discussing the matter at issue at considerable length, declined to revoke the approval of the Perrin line and advised Mr. Clapp of his right of appeal. An appeal having been filed, the Department on October 30, 1902, reversed and vacated the decisions of this office and directed that a new line be established. In disposing of the case the Department said:

> "No part of said line is in controversy except that portion between stations 20 and 25. If any natural or artificial objects indicating or marking Hancock's line of survey can be found, they must necessarily control and all parties in interest should be afforded an opportunity to establish such monuments if they can be found. But if they can not be identified as

> Hancock's original corners or stations by some ascertained monument or object, the line of survey must be established by the course and distance given in the patent, but closing upon station 25, irrespective of course and distance."

In carrying out the instructions of the Department, a contract was entered into with Deputy William A. Sickler for the re-establishment of the boundary of the grant from stations 20 to 25. Lafayette Mecham, C. L. Cate, and other alleged old settlers, protested against the approval of the survey made by Sickler, but this office, in its consideration of the matter in a decision rendered May 19, 1906, dismissed such protests and approved the survey, because, in its opinion, Sickler had executed the work in the manner directed by the Department. From this decision an appeal was filed and the Department February 28, 1907, affirmed the action of this office. A motion for review of the aforesaid Departmental decision was denied June 14, 1907.

The Department, in a letter addressed to Mr. H. H. Chase, of San Bernardino, California, under date of July 22, 1911, said:

> "In reply you are advised that a resurvey of the former line for several miles was made by a contracting surveyor of the General Land Office and his work was inspected and carefully tested by one of the most competent examiners of surveys. After the conclusions of the General Land Office were resisted by the proprietor of the lands within the grant, and after repeated considerations of the case on several appeals, this Department issued final instructions how Deputy Sickler's line should be established and the land office complied with that decision. It appears that Charles L. Cate was one of the few settlers who felt aggrieved at said decision. The survey received a great deal of attention in the years 1900 to 1906, and the survey of Deputy Sickler, made according to the rulings of this Department, was accepted May 19, 1906. The case has been a cause of great expense

to the Government and has been most exhaustively examined both in the field and in the several offices. I therefore consider it extremely unlikely that any new features will be presented requiring the case to be again reopened."

The letter of Mr. Mecham to President Wilson, referred by him to the Department of Justice, and the letter of the Attorney General requesting a report, require that the matter be given further attention.

Stations 20 and 25 of the Hancock survey have been so identified that there can be little question that Sickler and Perrin correctly relocated them. The respective surveys by Hancock, Sickler, and Perrin differ in the following particulars:

Leaving station 20, Hancock ran (see Memorandum 1) from a sycamore 16 inches in diameter, station on right bank of creek 10 links wide, course southwest, up said creek, N. 54° E., 30 chains, to a sycamore 30 inches in diameter. Station 21. Thence S. 51° E., crossing a creek 10 links wide, course southwest, at 1 chain, 43 chains, granite rock, 12x14x18 inches, in a rock mound, station at base of mountains. Station 22. Thence S. 8° 30′ W., 62 chains to station. Station 23. Thence S. 64° E., 15 chains to station. Station 24. Thence N. 26° 30′ E., 103 chains, 71 links, to a walnut tree 4 inches in diameter, station. At the forks of canon on the left bank of stream 12 links wide, course S. 8° W. Station 25.

Sickler surveyed with the courses and distances given by Hancock, beginning at station 20 and arbitrarily closing on station 25. The distance of the line from station 24 to 25, instead of being 103.71 chains was 85.70 chains, a difference of 18.01 chains.

Perrin ran from station 20 up the creek N. 52¾° E., 20 chains; thence S. 50° E., 42.94 chains; thence S. 8° 30′ W., 62 chains; thence S. 64° E., 158.20 chains; thence N. 26° 30′ E., 96.61 chains, to station 25.

Perrin, in a letter dated March 28, 1901, addressed to the Surveyor General of California, explains why he did not extend the line for 30 chains from station 20. He says that to do so would be to disregard the topography given by Hancock, and also a sycamore tree which corresponded to the sycamore which Hancock adopted as his station 21, and which bore evidence of having been marked; further, that to adopt the sycamore above mentioned as station 21, he would, on the next call, cross the creek called for in Hancock's line 21-22, and at substantially the correct distance, with a slight variation of the course, he found evidences of a corner. He further stated that to run line 20-21 the full distance of 30 chains "he would be on the wrong side of the creek and several chains away from it." The Perrin survey was examined in the field by H. P. B. Hollyday, an examiner of surveys, from June 4, to June 7, 1900. Speaking of the location of Hancock's station 21, he says:

> "The question is whether or not it was placed 30 chains N. 54° E., from station 20. From the best evidence that I could obtain, I should say not. * * * "

Extending the line 10 chains on course N. 54° E., from Perrin's closing at sycamore station No. 21, he says:

> "I cross creek several times before reaching 10 chains point, which point falls in creek bed. I look carefully for sycamore tree and also for sycamore stump. I am unable to find any evidence of even a sycamore stump of any size. In fact, the growth of sycamore trees seems to have stopped beyond my 20 chains point." (Perrin's sycamore station 21.)

He further stated that he found a group of alders and willows near where station 21 would be if the line were extended 30 chains from station 20, and that he found there an old detached hemlock stump which had the appearance of having been washed and deposited there by a freshet at some

time. (See Memorandum 6; see also Hollyday's original report.)

May 20, 1899, F. H. Brigham, Examiner of Surveys, submitted a report on Perrin's Contract No. 389, which includes the lines in controversy. (See Memorandum 5; see also Brigham's report.) He said of the Perrin line:

> "I am of opinion that the survey of the fractional townships examined by me as well as the northern boundary of Rancho Muscupiabe to have been properly and carefully executed and in conformity with the requirements of the manual and the deputy's special instructions, and I do not hesitate to recommend the acceptance of the work."

The report of Examiner Owens was made after an examination conducted under the directions of this office, and with full knowledge on his part of the respective contentions of the grant owners and the settlers, and is entitled to careful consideration. He inclosed with his report affidavits of Samuel Martin, Elizabeth Martin, and J. G. Newell.

Newell alleged that he was, in the year 1883, employed as head chainman to assist in making a survey of all the boundary lines of the Muscupiabe ranch; that the survey was made by William Reynolds, who was employed by John Hancock, then owner of the rancho; that Hancock was present at the erection and construction of the monuments thereafter described and designated; that while running the north line of said rancho said Reynolds, in the presence of said John Hancock, fixed and established station 21 at a sycamore tree, the top of which had been cut off and the outside trunk thereof burnt and mutilated by fire, the said Hancock then and there agreeing with the said Reynolds that the said tree truly marked and designated said station 21; that he visited said station 21 on Monday, the fourteenth of August, 1905, and found said burnt and mutilated sycamore tree and recognized the same as the tree which fixed and designated said station 21; that he recognized the

tree as being the one which was designated by the said Reynolds, aforesaid, from its mutilated and burnt condition and its position with reference to natural objects; that the tree was in the same condition as when first seen by him, except that there had been carved thereon the letter "M" and the figures "21"; that at a point 51° E. from said sycamore, 43 chains, the said Reynolds, himself, and other persons, including the said John Hancock, constructed a monument consisting of a pile of rock built about 18 inches high and about 3 feet in diameter; that there was inscribed on one of the rocks in the said monument the letter "M" and the figures "22"; that he visited the said monument on the fourteenth of August, 1905, and found the rock above mentioned, it having inscribed thereon the letter "M" and the figures "22", and that it was the same rock marked by the said Reynolds, aforesaid.

He described further the erection of monuments marking stations 23 and 24 by Reynolds, and the subsequent identification of both in the month of August, 1905; that Reynolds was employed by Hancock to make the survey and was paid for his services in the presence of affiant.

Samuel Martin swore, in the year 1880 he purchased from one Simpson his rights, title, etc., in a tract of land the southwesterly line of which is bounded by that portion of the line of the Rancho Muscupiabe that lies between stations 21 and 22; at the time of the purchase of said land a sycamore tree was pointed out to him as truly marking station 21 of the northerly boundary of said ranch; that he made inquiry of persons residing in the immediate vicinity of said land and learned that the said sycamore tree was universally accepted by all of said persons and residents as truly marking the said station; that the said sycamore was at that time topped and burnt on the southerly side and that there was visible a scar on the south side of said tree 8 or 10 inches square, which showed evidence of having been mutilated by being hacked and cut with some sharp instrument; that at that time a mound of rock lying S. 51° E., 43 chains, was

also pointed out as truly marking station 22 of the said northerly line of said ranch; that about 1892 a controversy arose between affiant and Julius Myers, who then owned the land lying immediately south of the line between stations 21 and 22, as to the true course of the line extending from said station 21 to station 22, and as to the true location of said station 22; that said difference was amicably settled in the year 1896, and adjusted between the parties, and a wire fence constructed by said parties between said stations, beginning at said sycamore tree as station 21, and extending S. 51° E., 43 chains, to the said mound of rock described as station 22, etc.

Elizabeth Martin said, under oath, that she is the wife of Samuel Martin, and the daughter of William Brown; that in 1873 her father settled upon the east half of section 26, township 2 north, range 5 west, S. B. M., and built his house thereon at a point about a quarter of a mile in a northeastern direction from station 21 in the north line of the Muscupiabe ranch, etc.; that she was at that time 12 years of age, and has resided upon said land continuously until the present time, with the exception of about one year; that at the time she took up her residence with her father, as aforesaid, station 21 was marked and designated by a sycamore tree which had inscribed thereon the letter "M" and the figures "21"; that about 28 years ago some person or persons, unknown to the affiant, cut off the top of said tree and burnt the sides and trunks thereof, and that the marks hereinbefore referred to were obliterated therefrom; that about the time said William W. Brown settled upon the land aforesaid, a controversy arose between John Hancock, who then owned the ranch, and the father of the affiant, as to the location of station 21, whereupon a survey was made at the mutual expense of said Brown and the said Hancock, and said sycamore tree was again designated and acknowledged and accepted as truly marking the station 21, and thereafter the same was acknowledged and truly accepted

by said Hancock and by the said Brown as the location of said station.

It is impossible to re-establish Hancock's line from station 20 to station 25 by the courses and distances given by the said Hancock. There is an actual shortage of 18.01 chains in distance, if the lines be extended along Hancock's courses. There can be no question that station 25 has been correctly relocated. It was placed by Hancock at the forks of the cañon, at the point of an acute angle, and was given as a walnut tree 4 inches in diameter, which was described on the approved Hancock plat of survey as Walnut station 25. I regard its identification as beyond question, and there is no dispute about the location of station 20. If, however, it is necessary, in closing the survey, to shift the position of either station 20 or 21, it is manifest that station 25 must remain as it is at present located. But there is no such necessity. Station 20 is accepted by the parties and its *locus* need not be made the subject of further inquiry.

Proceeding, then, upon the theory that stations 20 and 25 are correctly re-established, and, without reference to any previous adjudication of the question by the Department, seeking a solution of the question, I am convinced that the Sickler survey, which threw into the grant a strip of land approximately 10 chains in width, north of and substantially parallel with Perrin's lines 21-22, 22-23, and 23-24, should not stand. If, beginning with station 25, the calls be reversed and lines 25-24, 24-23, 23-22, 22-21, be run their full distances on the courses given in the Hancock survey, and line 22-21 be extended to a point where it would intersect line 20-21, the length of the latter line would be shortened from 30 to 12 chains, and a large portion of what seems to be regarded as the Muscupiabe grant would be thrown without the limits thereof and within the public domain. While, by running line 20-21 its full course, as was done in the Sickler survey, and throwing arbitrarily all the error in line 24-25, nearly 300 acres of very valuable land, that has

unquestionably been occupied in large part by *bona fide* settlers for more than a generation, has been included within the limits of the grant.

The Perrin survey is a compromise between the Sickler survey and one that would result if the lines between stations 25 and 20 were run on the reverse call from station 25 and closed arbitrarily on station 20. There is nothing to commend the Sickler survey, except that it follows absolutely the calls of Hancock from station 20 to station 24 and the course of Hancock from station 24 to station 25; but line 24-25, as re-established by Sickler, is 18.01 chains short of Hancock's line 24-25.

In the absence of any evidence of a corner between stations 20 and 25, and confronted by the fact that Hancock's courses and distances between those two stations is impossible, and if the usual mode of adjusting such discrepancies be followed, a proportionate adjustment of the errors between the two stations would be adopted. Line 20-21 and line 24-25 would be accorded equal dignity, but the error, in the absence of some controlling factor not here disclosed, should not all be thrown in one line. Moreover, to give, as has been done in the Sickler survey, line 20-21 its full distance, is to disregard the little topography that was shown in Hancock's survey, and is to ignore a tree called for as Hancock's station that corresponds with the one described by him, and which seems to have been accepted by all parties in interest as Hancock's station 21. It may very well be that the adoption of a line by the parties in interest would not be binding on the Government, but where, as in this case, it is impossible to re-establish the line from station 20 to station 25, as called for in the patent, and where the parties have, as they appear to have done in this case, accepted a line, which is a fair compromise between the extremes of running from station 20 in Hancock's courses and distances and closing arbitrarily on station 25 without regard to distance, and, on the other hand, beginning with station 25 and reversing the calls and closing arbitrarily on station 20

without taking into consideration the length of line 20-21, I think the compromise line should be adopted.

The Sickler line deprives the Government and the old settlers who claim under it of every foot of land that could, under any possibility, be taken from it and them, and it takes from these old settlers lands situated on or near the base of the mountains which have been occupied adversely to the grant claimants for more than 30 years.

The questions are quite fully discussed in the brief filed in 1907 in behalf of the protestants' motion for review, which was denied by the Department June 14, 1907. The arguments submitted therein so aptly cover all phases of the case that particular attention is now directed thereto. For the information and convenience of the Department, I attach hereto and make a part of this report Memorandums numbered 1 to 9, inclusive.

While several of the interested parties have conformed their entries to the line of the new survey, and have accepted patents for the tracts described by such amended entries, and notwithstanding the fact that the Department has heretofore given extended consideration to this question, I am so fully convinced that these old settlers have been wronged, that I must recommend that the matter of this survey be again reopened, and that the line as established by Perrin be adopted as the boundary of the grant, which being done, that the settlers be permitted to amend their entries so as to include the area that I believe has been wrongfully taken from them, and that patents then issue to such parties for the entries as thus amended.

Some of the lands in the disputed strip belong to the Government, and for this reason I believe that the Department has the jurisdiction to reopen the matter.

Record herewith.

Very respectfully,

FRED DENNETT,
Commissioner.

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Mr. Assistant Attorney General Kearful, with whom *The Solicitor General* was on the brief, for appellant.

Mr. F. W. Clements, with whom *Mr. Alex. Britton* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellees to restrain the Secretary of the Interior from carrying out a resurvey of a part of the boundary of a Mexican grant. The plaintiffs hold the legal title to the grant and the adjoining land belongs to the United States. The boundary was surveyed by one Hancock and on June 22, 1872, the grant was patented. A bill to set aside the patent was dismissed in *United States* v. *Hancock*, 133 U. S. 193, (1890.) Doubts having arisen as to where a portion of the Hancock line on the northern boundary ran, the Land Department employed one Perrin to make a resurvey. It found and reëstablished the original monuments except between Hancock's stations 20 and 25, and attempted to fix the line between these also. In 1901 the resurvey was approved by the Commissioner of the General Land Office, but in 1902 on an appeal, the Secretary of the Interior reversed the approval and ordered a new survey of the line between stations 20 and 25. This was made by one Sickler and was approved by the Secretary of the Interior on February 28, 1907. On September 5, 1913, the Secretary vacated the Sickler survey and ordered the reëstablishment of the Perrin line. The present bill to restrain the carrying out of this order was dismissed on motion by the Supreme Court of the District of Columbia but the decree was reversed and an injunction ordered by the Court of Appeals.

The bill, of course, is not a bill against the United States brought on the ground that it is claiming land

belonging to the plaintiffs. The bill does not seek to try the title. It is brought on the ground that the power of the Secretary is exhausted, and it may be doubted whether that is a matter with which the plaintiffs have anything to do. But however that may be, the whole proceeding on behalf of the United States is simply an effort to fix the boundaries of its own land. It is recognized, it was recognized when the Perrin survey was set aside, that the United States has no authority to change the Hancock line; but it has a right for its own purposes to try to find out where that line runs and the fact that its conclusions may differ from that of the owners of the Hancock grant does not diminish that right. So long as the United States has not conveyed its land it is entitled to survey and resurvey what it owns and to establish and reëstablish boundaries, as well one boundary as another, the only limit being that what it thus does for its own information cannot affect the rights of owners on the other side of the line already existing in theory of law. If, as the result of the survey adopted, the United States should give patents for land thought by the plaintiffs to belong to them, "the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now, is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the court." *Litchfield* v. *The Register*, 9 Wall. 575, 578. *Minnesota* v. *Lane*, 247 U. S. 243, 250.

We know of no warrant for the notion that the power is exhausted by a single exercise of it. Repeated retracement of lines, although, of course, exceptions, are well known, we believe, to the Land Department, as, with the limitation that we have expressed, there is no reason why they should not be. The case is different when the act of the Secretary is directed to a third person, as for instance, the approval of a map of the location of a railroad over public lands, where the approval operates as a

grant. *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165. See *New Orleans* v. *Paine*, 147 U. S. 261, 267. But this retracing of the Hancock line is not directed to the plaintiffs, but, as we have said, is an investigation by the United States on its own account. The plaintiffs gained no rights by the approval of the Sickler line; they lose none by the substitution of the Perrin line. These acts were neither adjudications nor agreements. The plaintiffs' rights were fixed before. Even after land had been sold with reference to a survey and plat that had been approved, this Court refused to restrain the Secretary from making a new survey in *Kirwan* v. *Murphy*, 189 U. S. 35. See *Lane* v. *United States ex rel. Mickadiet*, 241 U. S. 201, 208. *Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355.

We are of opinion that the decision of the Court of Appeals was wrong.

Decree of the Court of Appeals reversed, with directions to affirm the decree of the Supreme Court dismissing the bill.